



Oniang'o (Suing as the Administrator of the Estate of Raphael Oniang'o Olweny - Deceased) v Auma & 2 others (Environment and Land Appeal E059 of 2021) [2025] KEELC 153 (KLR) (27 January 2025) (Ruling)

Neutral citation: [2025] KEELC 153 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E059 OF 2021
SO OKONG'O, J
JANUARY 27, 2025**

BETWEEN

ANN AUMA ONIANG'O (SUIING AS THE ADMINISTRATOR OF THE ESTATE OF RAPHAEL ONIANG'O OLWENY - DECEASED) APPELLANT

AND

MORINE LEAH AKECH AUMA 1ST RESPONDENT

LAND REGISTRAR KISUMU 2ND RESPONDENT

HON.ATTORNEY GENERAL 3RD RESPONDENT

(Being an appeal from the judgment and decree of Hon. W.K. Onkunya SPM delivered on 30th June 2021 in Kisumu CMCELC No. 65 of 2018)

RULING

Background

1. The full facts of this appeal are set out in the judgment delivered by this court on 13th July 2023. In summary, all that parcel of land known as Title No. Kisumu/Kanyawegi/5397 was registered in the names of Oniang'o Olweny, Owala Olweny, Ayo Olweny and Osodo Wambuka (hereinafter together referred to as "the co-owners" and separately as "Oniang'o", "Owala", "Ayo" and "Osodo" respectively) on 17th February 2005 as tenants in common in equal shares of ¼ each. The registration appears to have been done several years after the conclusion of the adjudication exercise in Kisumu Kanyawegi Adjudication Section. All the owners of Title No. Kisumu/Kanyawegi/5397(hereinafter referred to only as "the suit property") are deceased. Oniang'o died on 20th September 1995. The Appellant is the administrator of the estate of Oniang'o. On 17th November 2006, the whole of the suit property was transferred to the 1st Respondent herein, Morine Leah Akech Auma.



The case before the lower court

2. The Appellant filed a suit before this court (Kisumu ELC No. 91 of 2015) against the Respondents through a plaint dated 14th April 2015 in her capacity as the administrator of the estate of Oniango. The Appellant averred that on or about 17th November 2006, the 1st and 2nd Respondents jointly and severally fraudulently and unlawfully caused the suit property to be transferred to the 1st Respondent without succession having been undertaken in respect of the estates of the co-owners thereof. The Appellant sought judgment against the Respondents for; a declaration that the transfer of the suit property to the 1st Respondent was void, an order compelling the 2nd Respondent to rectify the register of the suit property and restore the co-owners as the proprietors of the suit property, general damages for trespass, costs and interest.
3. The 1st Respondent was served with Summons to Enter Appearance but failed to enter appearance and to file a defence to the Appellant's claim. Interlocutory judgment was entered against her in default of appearance. The 2nd and 3rd Respondents filed a defence dated 5th May 2015 to the Appellant's claim. The 2nd and 3rd Respondents denied that the 2nd Respondent fraudulently and unlawfully caused the suit property to be transferred to the 1st Respondent. The 2nd and 3rd Respondents averred that if the suit property was transferred from the co-owners to the 1st Respondent then the 2nd Respondent effected the transfer procedurally in accordance with the law.
4. The suit was transferred from this court to the Chief Magistrate's Court at Kisumu and assigned a new number, Kisumu CMELC No. 65 of 2018(hereinafter referred to as "the lower court"). At the hearing of the suit in the lower court, only the Appellant gave evidence. The 2nd and 3rd Respondents did not tender any evidence in their defence. After the hearing, the lower court delivered a judgment on 30th June 2021 in which it dismissed the Appellant's suit with costs to the Respondents. The lower court made a finding that the Appellant had failed to prove her case on a balance of probabilities. The lower court framed three issues for determination namely; whether the Appellant had the capacity to file the suit, whether the suit property was fraudulently transferred to the 1st Respondent and whether the Appellant was entitled to the reliefs that she had sought. On the first issue, the court held that the Appellant only had the capacity to institute the lower court suit on behalf of the estate of Oniango in respect of his ¼ share in the suit property. The court found that the Appellant had no capacity to sue on behalf of the other co-owners of the suit property since she did not have the consent of the administrators of their estates. The court finally held that the Appellant did not have the capacity at all to file the lower court suit since she did not obtain consent from the administrators of the estates of the other co-owners of the suit property to file the suit.
5. On the second issue, the lower court cited several authorities and found that the Appellant had failed to prove that the 1st and 2nd Respondents transferred the suit property to the 1st Respondent fraudulently. The court found that a part from enumerating particulars of fraud, the Appellant failed to adduce evidence in proof of the fraud and illegality alleged against the 1st and 2nd Respondents in the transfer of the suit property to the 1st Respondent to the required standard. On the final issue, the court held that since the Appellant had no capacity to file the lower court suit and had also failed to prove fraud in the transfer of the suit property to the 1st Respondent, the Appellant was not entitled to the reliefs sought in the lower court.



The Appeal

6. The Appellant was aggrieved by the said decision of the lower court and preferred this appeal. In his Memorandum of Appeal dated 30th June 2021, the Appellant challenged the lower court's judgment on the following grounds;
 1. The Learned Magistrate erred in law and fact in finding that the Appellant had failed to prove her case on a balance of probabilities.
 2. The judgment of the Learned Magistrate was against the weight of evidence.
7. The Appellant prayed that the appeal be allowed and the judgment and decree of the lower court made on 30th June 2021 be set aside and substituted with an order granting the reliefs that were sought by the Appellant in the lower court. The Appellant also prayed for the costs of the appeal.
8. The appeal was argued by way of written submissions. This court considered the appeal and allowed the same in a judgment delivered on 13th July 2023. In allowing the appeal the court observed that the co-owners of the suit property held the same as tenants in common in equal shares. The court cited Megarry & Wade, *The Law of Real Property*, 17th Edition at pages 493 and 494 paragraphs 13-009 to 13-012, where the authors stated as follows regarding the nature of a tenancy in common:
 - “1. The tenants hold in undivided shares. Unlike joint tenants, tenants in common hold in undivided shares. Each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. Thus tenants in common have quite separate interests. The only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them. While the tenancy in common lasts, no one can say which of them owns any particular parcel of land.
 2. There is no right of survivorship. The size of each tenant's share is fixed once and for all and is not affected by the death of one of his companions. When a tenant in common dies, his interest passes under his will or intestacy, for his undivided share is his to dispose of as he wishes...
 3. Only the unity of possession is essential. Although the four unities of a joint tenancy may be present in a tenancy in common, the only unity which is essential is the unity of possession. In particular, it should be noted that the unity of interest may be absent and the tenants may hold unequal interests, so that one tenant in common may be entitled to a one –fifth share and the other to four-fifths, or one may be entitled for life and another in fee simple”.
9. The court further cited *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, where the court stated as follows on the same issue:

“By definition, a tenancy in common is a tenancy by two or more persons, in equal or unequal undivided shares, with each person having the right to possess the whole property but no right of survivorship. The central characteristic of a tenancy in common is that each tenant is deemed to own by himself, a physically undivided part of the entire parcel (see. *Black's Law Dictionary*, 9th Edn and *Thomas F. Bergin & Paul G. Haskell*, 'Preface to *Estates in Land and Future interests* 54 2nd Edn, 1984)”.



10. The court noted that the suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) and cited Section 103 of the Registered Land Act which states as follows on tenancies in common:

- “(1) Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor, his share shall be administered as part of his estate. (emphasis added)
- (2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.”

11. The court stated that since the Appellant was the administrator of the estate of Oniango who owned $\frac{1}{4}$ undivided share in the suit property, on the death of Oniango, his $\frac{1}{4}$ share in the suit property devolved to his estate. The court stated that as the administrator of Oniango’s estate the Appellant had a right to bring a suit on behalf of the estate to protect Oniango’s $\frac{1}{4}$ share in the suit property. It was on that basis that the court held that the Appellant, had the capacity to bring the lower court suit to challenge the transfer of Oniango’s $\frac{1}{4}$ share in the suit property to the 1st Respondent. The court observed that the Appellant did not bring the suit on behalf of the other co-owners of the suit property and as such she did not require their consent to file the suit. The court therefore faulted the lower court in its finding that the Appellant required the consent of the administrators of the estates of the other co-owners of the suit property to file the lower court suit.

12. On proof of fraud and illegality, the court agreed with the 2nd and 3rd Respondents that fraud must be pleaded with the necessary particulars and proved to a standard beyond a balance of probabilities and that the burden of proof of fraud and illegalities in the transfer of the suit property to the 1st Respondent rested with the Appellant. The court was of the view however that, once the Appellant established that at the time the suit property was transferred to the 1st Respondent, Oniango and some of the other co-owners of the suit property were deceased and that for Oniango, the administrators of his estate were not involved in the transfer of his $\frac{1}{4}$ share in the suit property to the 1st Respondent, the burden shifted to the 1st and 2nd Respondents to prove that the suit property was legally transferred and registered in the name of the 1st Respondent.

13. The court noted that the 1st Respondent did not defend the suit and as such all the allegations of fraud and illegalities pleaded in the plaint against her by the Appellant were not controverted. The court noted that the evidence adduced by the Appellant that the 1st Respondent caused the suit property to be transferred to herself after the death of Oniango and before a grant of letters of administration had been issued in respect of his estate was also not controverted. The court noted further that the 2nd Respondent was the custodian of land records and that it was the 2nd Respondent who registered the transfer of the suit property from the co-owners thereof to the 1st Respondent. The court noted that the 2nd Respondent had a duty to ensure that the process of transfer of the suit property that was owned by the co-owners as tenants in common was conducted in accordance with the law. The court was of the view that once the Appellant proved that the suit property was transferred to the 1st Respondent after the death of Oniango and some of the co-owners thereof and that they were not involved in the transfer, the 2nd Respondent had a duty to prove that the law was followed in the transfer of the suit property to the 1st Respondent. The court noted that although the 2nd Respondent claimed in its defence that the suit property was transferred to the 1st Respondent procedurally and in accordance with the law, the 2nd Respondent chose not to tender any evidence at the trial to prove the legality of the transaction.



The court noted that at the end of the trial, there was no evidence before the court showing how the suit property moved from the names of deceased persons to the name of the 1st Respondent. The court was satisfied from the evidence that was before the lower court that the Appellant had proved not only the illegality in the transfer of the suit property to the 1st Respondent but also that the transfer was fraudulent.

14. The court stated that failure on the part of the 1st Respondent to defend herself against the Appellant's claim that she had acquired the suit property fraudulently and that of the 2nd Respondent who is the custodian of land records to place before the court documents that were used to transfer the suit property to the 1st Respondent could only be construed as evidence that the whole process was carried out fraudulently. The court therefore faulted the lower court in its holding that the Appellant had not proved fraud against the Respondents.
15. In conclusion, the court held that the Appellant had proved her case in the lower court to the required standard and was entitled to the reliefs sought save for general damages that was not proved. The court made the following final orders in the matter:
 1. The judgment delivered by the lower court on 30th June 2021 in Kisumu CMC ELC No. 65 of 2018 was set aside.
 2. Judgment was entered for the Appellant against the Respondents as follows;
 - (i) A declaration that the transfer of all that parcel of land known as Title No. Kisumu/Kanyawegi/5397 from Oniango Olweny, Owala Olweny, Ayo Olweny and Osodo Wambuka to the 1st Respondent was illegal, null and void.
 - (ii) The Registration of the 1st Respondent as the proprietor of all that parcel of land known as Title No. Kisumu/Kanyawegi/5397 and the title deed issued to her in respect of the property were cancelled.
 - (iii) The Land Registrar, Kisumu County, the 2nd Respondent was directed to forthwith cancel entries numbers 2 and 3 in the register of Title No. Kisumu/Kanyawegi/5397 and revert the property to the names of Oniango Olweny, Owala Olweny, Ayo Olweny and Osodo Wambuka.
 3. Each party was to bear its own costs of the lower court suit and of the appeal.

The application before the court

16. What is now before the court is the 1st Respondent's application brought by way of Notice of Motion dated 10th June 2024. In the application, the 1st Respondent sought the following main orders;
 1. That the ex-parte proceedings undertaken, the ex-parte judgment entered in this matter on 13th July 2023 and the subsequent proceedings and/or orders if any be set aside ex debito justitiae.
 2. That the 1st Respondent be granted leave to file her submissions/defence/response to the memorandum of appeal.
 3. That the costs of the application be in the cause.
17. The application was brought on the grounds set out on the face thereof and on the supporting affidavit of the 1st Respondent dated 11th June 2024 and various further affidavits of the 1st Respondent. The 1st Respondent averred that she was desirous of defending the appeal and that she had a good defence to the Appellant's appeal. The 1st Respondent averred that she was not served with the Summons



in the lower court suit. The 1st Respondent averred that the Appellant misled the court that the 1st Respondent could not be found while the 1st Respondent was her aunt and was staying barely 20 meters from the Appellant's home. The 1st Respondent averred that the delay in bringing the application was as a result of her not being aware of the existence of the suit and the appeal proceedings. The 1st Respondent averred that she learnt of the proceedings when the Appellant and her family members went to the area Chief to seek a letter to enable them to do succession regarding the suit property. The 1st Respondent averred that the Chief who was aware that she was the owner of the suit property alerted her of the Appellant's visit to his office.

18. In a replying affidavit sworn on 15th July 2024 by her advocate David Otieno, the Appellant contended that the 1st Respondent was served with Summons to Enter Appearance through registered post after leave was granted by the court as attempts to effect personal service upon the 1st Respondent failed. The Appellant averred that the 1st Respondent failed to enter appearance and the matter was thereafter heard and determined by the lower court on 30th June 2021 against the Appellant. The Appellant averred that she was dissatisfied with the lower court's judgment and preferred this appeal which was heard and determined on 13th July 2023. The Appellant averred that the 1st Respondent showed no interest in the court proceedings for over 9 years until she learnt that the Appellant was taking steps to execute the court's judgment. The Appellant averred that the Appellant was guilty of indolence. The Appellant averred that the judgment and decree issued by this court were regular and lawful, and there was no valid reason before the court why the same should be set aside. The Appellant averred that the documents exhibited by the 1st Respondent did not support her claim to the suit property and as such the court would not make a different decision even if the judgment of 13th July 2023 was set aside. The Appellant urged the court to dismiss the application.
19. The 1st Respondent filed a document titled "1st Respondent's Further Replying Affidavit" dated 25th September 2024 (the signature is different from that in the supporting affidavit). The 1st Respondent reiterated that she was not served with the Summons to Enter Appearance and that no leave to serve her by way of substituted service was sought and granted. The 1st Respondent reiterated further that no formal proof was conducted in the lower court and that the Appellant did not give evidence before that court. The 1st Respondent filed another document titled "1st Respondent's supplementary (sic) affidavit" dated 26th September 2024 (the signature is different from the signature in the supporting affidavit). In the affidavit, the 1st Respondent stated that one Zacharia Okumu Araya was a witness to the agreement of sale between the 1st Respondent's father, Lameck Okumu, deceased and one of the co-proprietors of the suit property, Osodo Wambuka, deceased. The 1st Respondent stated further that one, John Omolo Owino a former member of the Land Control Board was present when the 1st Respondent's father, Lameck Okumu, deceased and one of the co-proprietors of the suit property, Osodo Wambuka, deceased appeared before the Board and consent was granted for the suit property to be transferred and registered in the name of the 1st Respondent. The 1st Respondent stated that the area Chief one Paul Otieno had confirmed that one of the co-proprietors of the suit property, Osodo Wambuka, deceased told him that he had sold a portion of the suit property to the 1st Respondent's father, Lameck Okumu, deceased. The 1st Respondent stated that her efforts to obtain documents from the Land Registry relating to the transaction involving her and the said Osodo Wambuka did not succeed which was a sign of interference. The 1st Respondent filed another document titled "1st Respondent's Supplementary Affidavit". In the affidavit, the 1st Respondent stated that her deceased father, Lameck Ngwara Okumu purchased the suit property from Ernest Osodo Wambuka on 27th September 2006 and 27th October 2006. The 1st Respondent annexed the two agreements to the affidavit as exhibits.



19. The application was argued through written submissions. The 1st Respondent filed submissions dated 6th October 2024 while the Appellant filed submissions dated 24th October 2024. I have considered the 1st Respondent's application together with the many affidavits filed in support thereof. I have also considered the replying affidavit filed by the Appellant in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the various case law cited in support thereof. What is before this court is an appeal and not the lower court suit. Order 42 Rule 23 of the Civil Procedure Rules provides as follows:
23. Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the court to which the appeal is preferred to re-hear the appeal; and if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall re-hear the appeal on such terms as to costs or otherwise as it deems fit.” (underlining mine)
20. In Attorney General v. Law Society of Kenya & another [2017]eKLR the court defined sufficient cause as follows:
- Sufficient cause or good cause in law means:
- ...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See Black's Law Dictionary, 9th Edition, page 251.
- Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events.”
21. The burden was on the 1st Respondent to show that sufficient cause exists to warrant the setting aside of the judgment delivered herein on 13th July 2023 and the hearing of the appeal afresh. In summary, the 1st Respondent has sought the setting aside of the said judgment on the following main grounds; first, she was not served with the Summons to Enter Appearance in the lower court and as such did not participate in the lower court suit and likewise the appeal, and secondly, that she has a good defence/ answer/response to the Appellant's claim. I have considered these two grounds put forward by the 1st Respondent. From the lower court proceedings and the documents annexed to the Appellant's replying affidavit, I am satisfied that attempts were made to serve the 1st Respondent with the Summons to Enter Appearance personally and when that failed, the Appellant sought leave of the court to serve her by way of substituted service. On 22nd February 2016, the court granted the Appellant leave to serve the 1st Respondent with Summons to Enter Appearance through an advertisement in a newspaper with national circulation. I am satisfied that the 1st Respondent was served through a newspaper advertisement. The newspaper advertisement annexed to the Appellant's replying affidavit was not challenged by the 1st Respondent. Whether or not the Appellant knew the 1st Respondent's residence and should have served her through personal service rather than through newspaper advertisement was for the court that granted leave for service to be effected through advertisement to consider. That court was satisfied that attempts had been made to effect personal service and that those attempts were not successful. I cannot sit on an appeal against the order that granted leave to the Appellant to serve the 1st Respondent with the summons through substituted service. From the evidence on record, I am satisfied that proper service was effected upon the 1st Respondent and since the 1st Respondent never entered appearance, the lower court rightly proceeded with the suit in her absence and entered judgment in the matter on 30th June 2021 the absence of the 1st Respondent notwithstanding. Since the 1st Respondent never entered an appearance and did not participate in the lower court suit, the Appellant who was dissatisfied with the lower court judgment had no obligation to serve the 1st



Respondent with the memorandum and a record of appeal. The appeal before this court was in the circumstances lawfully heard and determined the absence of the 1st Respondent notwithstanding. I therefore agree with the Appellant that the judgment entered herein on 13th July 2023 was valid and regular. For the foregoing reasons, the alleged non-service of Summons to Enter Appearance upon the 1st Respondent is not sufficient ground to warrant the setting aside of the judgment of this court entered on 13th July 2023.

22. Concerning the defence that the 1st Respondent has claimed to have against the Appellant's claim/appeal, my view is as follows: I agree with the Appellant that even if the judgment of the court delivered on 13th July 2023 were to be set aside and the appeal heard a fresh, this court would not arrive at a different judgment. According to the 1st Respondent's supplementary affidavit sworn on 8th October 2024, the 1st Respondent's deceased father, Lameck Ngwara Okumu through whom the 1st Respondent is said to have acquired the suit property, purchased the suit property from one of the co-owners thereof, Ernest Osodo Wambuka on 27th September 2006 and 27th October 2006. It is common ground that as of 27th September 2006, all the co-owners of the suit property were deceased apart from Osodo Wambuka who purported to sell the property to the 1st Respondent's deceased father. It is also common ground that Osodo Wambuka had only ¼ share in the suit property and that he was not the administrator of the estate of the other co-owners of the suit property including the Appellant's father, Oniango Olweny, deceased. It follows therefore that Osodo Wambuka could only sell his share in the suit property to the 1st Respondent's deceased father. He could not purport to sell and transfer to the 1st Respondent in place of her deceased father the whole of the suit property. In fact, according to Paul Otieno a former Assistant Chief who is said to have witnessed, the agreements between Osodo Wambuka and the 1st Respondent's deceased father, Osodo Wambuka only sold his share in the suit property and not the whole land (See 1st Respondent's Supplementary Affidavit dated 26th September 2024). These facts and the legal position will not change even if the appeal is re-opened for a fresh hearing. I am therefore not persuaded that the 1st Respondent has an arguable point to put forward in response to the appeal that the court should allow her to argue in a fresh hearing of the appeal. I wish to add that all is not lost for the 1st Respondent. If she or her deceased father purchased Osodo Wambuka's share in the suit property, she can still pursue that share of the suit property since the judgment of 13th July 2023 merely reverted the suit property to the names of the original deceased owners for proper succession and distribution to be done in respect of their estates.

Conclusion

23. In conclusion, I am not satisfied that sufficient cause has been shown by the 1st Respondent to warrant the setting aside of the judgment entered herein on 13th July 2023. The Notice of Motion dated 10th June 2024 has no merit in the circumstances. The same is dismissed with costs to the Appellant.

DELIVERED AND DATED AT KISUMU ON THIS 27TH DAY OF JANUARY 2025

S. OKONG'O

JUDGE

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Mr. Otieno David for the Appellant

Mr. Onyango for the 1st Respondent

N/A for the 1st and 2nd Respondents



Ms. J. Omondi-Court Assistant

